

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REX METCALFE

Claimant

VS.

MENU FOODS MIDWEST CORP.

Respondent

AND

TIG-PREMIER INSURANCE CO.

KANSAS EMPLOYERS W.C. FUND

Insurance Carriers

Docket No. 264,523

ORDER

Respondent requests review of the March 13, 2003, preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) ordered the respondent to pay temporary total disability compensation at the rate of \$331.27 per week beginning November 7, 2002, until claimant has reached maximum medical improvement or has been released to return to gainful employment. The ALJ further found the claimant's date of accident to be March 31, 2001.

The respondent and its insurance carrier, TIG Premier Insurance Company, (TIG) requests review and argues the ALJ erred in determining the claimant's date of accident. TIG agrees claimant suffered accidental injury during its period of insurance coverage. But TIG argues that after receiving treatment the claimant returned to work with respondent and suffered an aggravation or new injury. Consequently, TIG concludes that the award of benefits should be assessed against the Kansas Employers Workers Compensation Fund, the insurance carrier that provided respondent's insurance coverage at that time.

Claimant argues that because he returned to accommodated work the ALJ appropriately determined the date of accident. Consequently, the claimant argues the ALJ's Order for Compensation should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant alleged a series of repetitive traumas each and every day worked. It is undisputed claimant suffered accidental injury arising out of and in the course of his employment with respondent. Claimant developed problems in February 2001 and was referred for medical treatment. Claimant was taken off work in March 2001 and then released to return to work in August 2001. Claimant sought additional medical treatment in 2002 and was again taken off work on November 7, 2002.

TIG argues the evidence is uncontroverted that claimant's condition worsened upon his return to work for respondent and accordingly claimant suffered an aggravation or intervening new accident. TIG argues those events occurred during the period of time when the Kansas Employers Workers Compensation Fund provided insurance coverage for respondent. Consequently, TIG argues it is not liable for benefits for that subsequent aggravation or accident.

Here, the Board concludes there is no dispute concerning the compensability of the claim. The dispute that arises in this case is whether claimant's need for preliminary hearing benefits is the result of his initial series of accidents or whether such need is the result of his each and every day work activities after he returned to work in August 2001. The Board, therefore, concludes TIG's arguments relate to what date of accident should control for the purpose of determining which insurance carrier is liable for claimant's current need for benefits.

The Board only has jurisdiction to review preliminary hearing findings in cases where one of the parties allege that the ALJ exceeded his or her jurisdiction.¹ This jurisdiction includes the specific issues identified in K.S.A. 44-534a(a)(2) that raise questions only as to the compensability of the claim.² Here, the issue is whether claimant's date of accident is before or after TIG's insurance coverage ended. Regardless of which date of accident (or accidents) is found to be the precipitating cause for claimant's medical treatment and temporary total disability benefits, it does not alter the fact that the injury (or injuries) is the result of claimant's employment with respondent. That fact appears to be undisputed.

There is no dispute that claimant's present need for preliminary benefits is the result of an injury that arose out of and in the course of employment with respondent. The dispute is which insurance carrier should be responsible for paying claimant's workers

¹ See K.S.A. 44-551(b)(2)(A).

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 676, 994 P.2d 641 (1999).

compensation benefits. And that dispute is resolved by determining the appropriate date of accident, which is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the Judge exceeded his jurisdiction.³ Clearly, the Judge did not exceed his jurisdiction.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

The Board is unaware of any other provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers for the same respondent.

The Board concludes, at this juncture of the proceedings, it does not have jurisdiction to review the ALJ's findings contained in his preliminary hearing Order and, therefore, the respondent and its insurance carrier, TIG's request for review is dismissed.

The parties may preserve the date of accident issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

AWARD

WHEREFORE, it is the finding of the Board that it does not have jurisdiction to review the findings contained in Administrative Law Judge Brad E. Avery's March 13, 2003, preliminary hearing Order For Compensation and the respondent's appeal is dismissed.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

BOARD MEMBER

³ Id.

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

c: Stanley R. Ausemus, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and TIG Premier Insurance Co.
Edward D. Heath, Attorney for Respondent and Kansas Employers W.C. Fund
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation